IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 444.

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

v.

HUGHES TRANSPORTATION, INC., and
INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONER.

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I. As the only basis for its assertion that this case "is uniquely of limited import" (ICC Br., p. 4), the Commission appears to suggest that the problem existing in the present case can be obviated in future cases if the district courts will construe a stay entered under § 222 (b) (3) of the Interstate Commerce Act as a "referral" within the meaning of 28 U. S. C., §§ 1336 (b) and 1398 (b) so as to vest exclusive jurisdiction and venue to review and set aside a Commission decision in the original § 222 (b) (2) court. (ICC Br., pp. 7-8.) But, assuming *arguendo* the correctness of the Commission's construction of 28 U. S. C., §§ 1336 (b) and 1398 (b) and its prediction of what district courts may do in the future, the problems created by the decisions below will nevertheless persist. For

there is nothing in the decisions below, or in the position of the Commission as expressed in its brief, which would require a competing carrier commencing a § 222 (b) (2) suit subsequent to, and for the enforcement of, a Commission order (such as Hughes' present suit) to file it in the same district in which the original § 222 (b) (2) suit (such as that of Tri-State here) was filed. So if, as the court of appeals holds, any competing carrier is permitted to institute a new action for the enforcement of a Commission order before the validity of the order can be judicially determined, such actions can and will be brought in courts having no jurisdiction, even under the Commission's construction of 28 U. S. C., § 1336 (b), to review the order's validity.[1]

Moreover, the Commission's construction of 28 U. S. C., §§ 1336 (b) and 1398 (b) as embracing a stay required to be entered under § 222 (b) (3) is extremely doubtful—and particularly so in cases where, as here, the Commission's administrative investigation is initiated independently of and does not result from or have any connection with the § 222 (b) (2) action in which the stay is entered.[2] The only court to which the question has been

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[1] The instant case is illustrative. Respondent Hughes is incorporated in and has its principal place of business in South Carolina (R. 1). If it had not been the subsidiary of and therefore represented by the same counsel as Tri-State, its suit undoubtedly would have been brought in the District Court for South Carolina rather than the Missouri district court in which the first § 222 (b) (2) suit by Tri-State was pending.

[2] The Commission's brief states that Tri-State's suit "first gave rise to the administrative proceeding before the Commission" and that it therefore is "particularly appropriate" that an injunction enforcing the administrative order be entered by the court in which that suit was brought (ICC Br., p. 7). On the contrary, however, the Commission's own counsel, Mr. Horak, testified in the district court that the Commission had begun its investigation of Baggett's operations months before Tri-State's suit was filed (App. R. 19-20), and the Commission's institution of its proceeding was made without reference to or mention of the Tri-State action (R. 97-99).

presented (the district court below in the present litigation) has held that such a stay does not constitute a "referral" under §§ 1336 (b) and 1398 (b) (Petition, Appendix D, pp. 40-41).

The Commission also asserts without explanation that the "peculiar posture" of this case is "largely of the petitioner's devising" (ICC Br., p. 8). It should be mentioned that petitioner presented to the district court below for filing in the Tri-State action, in the event the district court determined it had judicial-review jurisdiction, a third-party complaint against the Commission and United States to review and set aside the Commission's cease-and-desist order. The third-party complaint was withdrawn after the district court held that it had no jurisdiction to consider it (Petition, Appendix D, p. 44). Far from devising the posture of this litigation, the petitioner thus has made every effort to avoid having the enforcement and judicial review actions proceed in different courts. And if the courts below are correct in holding that a Commission order may be enforced by a court thus determined to be without jurisdiction to review its validity, the "peculiar posture" of this case will be the posture of every case brought by a competing carrier under § 222 (b) (2) to enforce a Commission order.[3]

II. The Commission argues that its conduct and the decisions below cannot affect petitioner's right to judicial review of the Commission's order (ICC Br., pp. 6-7). Aside from the fact that judicial review can be only an empty exercise when petitioner has already been enjoined

[3] It is stated by the Commission that this case is "without precedent in the three years of litigation that have followed the Act's amendment" (ICC Br., p. 8). The reason is that in no other case has enforcement of an administrative order been sought pending judicial review of the order. It may be anticipated however that competing carriers henceforth will be quick to avail themselves of the precedent established by the courts below if allowed to stand.

in accordance with the Commission's order by the courts below, both the Commission and Tri-State (as intervenor) have moved to dismiss the judicial review action for improper venue and lack of jurisdiction, respectively, on the grounds that the district court below has exclusive venue and jurisdiction under 28 U. S. C., §§ 1336 (b) and 1398 (b), notwithstanding the prior refusal by the court below to take jurisdiction of petitioner's third-party complaint for judicial review (Baggett S. R. 3-4, 6). Should their motions be granted, judicial review will be wholly barred since it is now too late to file a new action in the court below within the 90-day period prescribed by 28 U. S. C., § 1336 (c).

III. Respondent Hughes argues that the problems in the present case are not apt to re-occur because the **Commission** committed an error, due to its "lack of experience" with § 222 (b) (2), in initiating the administrative interpretation of petitioner's certificate and consequently causing Tri-State's § 222 (b) (2) suit to be stayed although petitioner's operations were in "clear and patent" violation of its certificate so as to preclude the necessity of an administrative interpretation and a stay (Hughes Br., pp. 5, 7, 9). However the Commission, to the contrary, acknowledges that one purpose of the statutory requirement of a "clear and patent" violation was to leave, in accordance with the admonition in **Service Transfer Co. v. Virginia,** 359 U. S. 171, 178, the interpretation of certificates in the Commission rather than the courts (ICC Br., p. 5). The situation in the present case results from the Commission's adherence to that congressional purpose through its administrative interpretation of petitioner's certificate with a consequent stay of Tri-State's suit, but then departing from the congressional intent by seeking enforcement of its interpretation before its validity can be judicially determined. Nowhere does the Commission disavow an intention to pursue the same course

in future cases. And the effect of the position thus assumed by the Commission is that a matter (such as a novel question of certificate interpretation) which is not a "clear and patent" violation originally becomes "clear and patent" immediately upon the Commission's determination. The Commission's position is contrary to the language and the legislative intent of the statute.

Respectfully submitted,

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